Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79—1815

DR. LEON SALOB,

Petitioner,

against

GORDON M. AMBACH, Commissioner of Education of the State of New York, NEW YORK STATE EDUCATION DEPARTMENT and THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO CERTIORARI

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Opinion Below

The opinion of the New York Supreme Court, Appellate Division, Third Department is reported at 73 AD 2d 756 and is reproduced in full in petitioner's Supplementary Appendix, pp. 41-43.

The New York Court of Appeals denied leave to appeal to that Court on February 20, 1980 (49 NY 2d 703). That order is reproduced in the Petition at p. 13.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 USC § 1257(c) and United States Constitution Article 3.

Questions Presented

Was petitioner's right to be free from unreasonable search and seizure violated when a state investigator posing as a patient entered petitioner's chiropractice office, underwent X-ray treatment and took brochures, business cards and letterheads from a public display table in the office without warrant?

Is the provision of New York State Education Law § 6510, subd. 2(b) providing that in administrative disciplinary hearings "[t]he panel shall not be bound by the rules of evidence, but its determination of guilt shall be based on substantial legal evidence", violative of petitioner's constitutional rights?

Statement of the Case

Petitioner, a New York licensed chiropractor, was found guilty in a disciplinary hearing before a New York State administrative agency of practicing the profession of chiropractic beyond its authorized scope and of unprofessional conduct in violation of New York Education Law § 6509, subds.. 2 and 9 respectively, notably by taking X-rays of an agent of the New York State Education Department while not authorized to use X-ray in his practice.*

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* Under New York Education Law § 6556 (subd. 1) petitioner is required to take and pass a separate examination before being authorized to take X-rays. Petitioner has failed to pass that examination.

Petitioner was charged with additional acts of unprofessional conduct, *to wit,* deliberately and wilfully misrepresenting to the licensing agency that he would not X-ray patients until duly licensed; holding himself out to practice acupuncture; engaging in deceptive, misleading and sensational advertising; using the title "Doctor" without indicating the profession in which he held a doctorate, contrary to law; claiming special professional attainments he did not possess; and practicing chiropractic under an assumed name which he did not register.

The administrative agency found petitioner guilty of each of the charges based on substantial legal evidence. Following administrative review, the agency suspended his license for 24 months but stayed the last 15 months of the suspension, resulting in an actual 9 month suspension. This suspension became effective on or about February 28, 1980, five days after the order of the Court of Appeals denying leave to appeal was mailed to counsel.

Petitioner sought State judicial review by instituting a petition under New York Civil Practice Law and Rules § 7800 et seq. and Education Law § 6510, subd. 4. On December 20, 1979, the Appellate Division of the New York State Supreme Court rendered a decision unanimously confirming the order of the administrative agency and dismissed the petition (Supplementary Appendix pp. 41-43).

Petitioner moved for leave to appeal to the New York State Court of Appeals. The Court of Appeals denied leave by order dated and entered February 20, 1980 (Pet. p. 13). An appeal purportedly as of right was dismissed by the Court on the ground that no substantial constitutional question was directly involved (Pet. p. 13).

Statutes Involved

Education Law § 6509. Definitions of professional misconduct.

Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

* * *

2. Practicing the profession fraudulently, beyond its authorized scope, . . .

* * *

9. Committing unprofessional conduct as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents.

Section 6551. Definition of practice of chiropractic.

1. The practice of the profession of chiropractic is defined as detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxation of or in the vertebral column.

2. a. A license to practice as a chiropractor shall not permit the holder thereof to use radio-therapy, fluoroscopy, or any form of ionizing radiation except x-ray which may be used only as follows:

(1) X-ray shall only be used for the purposes of chiropractic analysis;

(2) Such use of X-ray shall be confined to persons over the age of 18; and

(3) The era of such X-ray exposure shall not extend below the level of the top of the first lumbar vertebra.

* * *

Section 6556. Special provisions

1. Any chiropractor who holds a license stating that the holder is not authorized to use X-ray in his practice shall in each registration, continue to obtain a license so marked. Any chiropractor holding such a license may obtain a license permitting the use of X-ray provided he first passes an examination in the use and effect of X-ray satisfactory to the board and the department.

* * *

Rules of the New York State Board of Regents (8 NYCRR)
Section 29.1 General provisions for all professions.

(a) Unprofessional conduct shall be the conduct prohibited by this section. The provisions of these rules applicable to a particular profession may define additional acts or omissions as unprofessional conduct and may establish exceptions to these general prohibitions.

(b) Unprofessional conduct in the practice of any profession licensed or certified pursuant to title 8 of the Education Law shall include:

(1) willful or grossly negligent failure to comply with substantial provisions of Federal, State or local laws, rules or regulations governing the practice of the profession;

* * *

(9) practicing or offering to practice beyond the scope permitted by law, or accepting and performing professional responsibilities which the licensee knows or

has reason to know that he or she is not competent to perform. . . .

• • •

(12) advertising or soliciting for patronage that is not in the public interest:

(i) advertising or soliciting not in the public interest shall include but not be limited to advertising that:

(a) is false, fraudulent, deceptive, misleading, sensational or flamboyant;

• • •

(f) makes claims of professional superiority which can not be substantiated by the licensee, who shall have the burden of proof . . .

Section 29.2. General provisions for health professions.

(a) Unprofessional conduct shall also include, in the professions of . . . chiropractic . . .

• • •

(4) using the word "Doctor" in offering to perform professional services without also indicating the profession in which the licensee holds a doctorate. . . ."

The Findings

Upon the entire record of an administrative hearing at which the principal witnesses were petitioner and the investigator for the State Education Department, the panel found as fact, that petitioner was licensed to practice chiropractic in the State of New York but that his license did not include the authority to use X-ray, and that petitioner was not licensed to practice medicine, dentistry or acupuncture. Investigator Caruso took two photographs of the premises to be used in evidence. The photographs were

taken from the street in front of petitioner's premises and show signs stating "Commack Chiropractic Office", "Acupuncture" and "Dr. L.J. Salob, Chiropractor".

The panel further found that the investigator walked up to the door of the office, which bore a sign stating "Ring bell, walk in". He rang the bell and entered.

In the waiting room, the investigator removed a business card from a wall rack in the waiting room; obtained a piece of blank stationery with letterhead and a pamphlet. The panel found that those documents were taken from an area in petitioner's office where they were offered to the general public as part of petitioner's practice.

The panel found that petitioner's business card contains the information "Dr. L.J. Salob, Commack Chiropractic Center", and the phrase "Have hands, will travel, wire 864-3931" and that his letterhead contains the same information except that the word "Office" is used instead of the word "Center" in the phrase "Commack Chiropractic Office".

The panel found that petitioner did not register the name "Commack Chiropractic Center" which appeared on his letterheads and bill forms with the Suffolk County Clerk's office.

The panel found that on May 2, 1978, the investigator met with petitioner and discussed whether acupuncture would help alleviate pain and muscle spasms in his right arm. Petitioner recommended an X-ray be taken to determine if acupuncture was needed. The panel found that on May 19, 1978, the investigator returned to petitioner's office pursuant to appointment, at which time petitioner took an X-ray of the investigator.

The panel found that on May 19, 1978, the investigator, with the approval of petitioner, took two pamphlets from the counter in petitioner's waiting room. The pamphlets

are entitled "Why you need X-ray" and "Arm and shoulder pain".

The panel found that on June 2, 1978, when the investigator returned to petitioner's office, petitioner drew "plumb lines" on the X-ray he had taken on May 19, 1978 and advised the investigator that he found a three-quarter inch difference in the height of the investigator's shoulder structure. Petitioner then gave the investigator the X-ray so that he could continue treatments with a chiropractor closer to the investigator's home.

The panel specifically found that the X-ray which Investigator Caruso identified, was, in fact, the X-ray of that investigator. The panel rejected the opinion of Dr. Sheldon, petitioner's expert. In rejecting his opinion, the panel noted that Dr. Sheldon, although testifying that a visual examination of a person could rule out that person as the subject of a specific X-ray, refused to examine Caruso to rule him out as a subject of the X-ray in evidence.

The panel found that petitioner held himself out to Investigator Caruso as being able to practice acupuncture.

Reasons For Denying The Writ

Petitioner has failed to raise any question of general importance warranting the exercise of this Court's certiorari jurisdiction, Rule 19(1).

As To The Alleged Search:

Petitioner appears to imply that in some way his Fourth, Fifth and Fourteenth Amendment rights were violated by an agent of the licensing authority entering his office premises as a patient to determine if petitioner was violating the law. Such undercover work has been held to be a necessary part of law enforcement, *Lewis* v. *United States,* 385 U.S. 206 (1966). Certainly, where petitioner invites

the public to enter his professional office, even when that office is in his home, he must assume that agents of the licensing authority might also enter to check his compliance with the law. *Harris* v. *United States,* 390 U.S. 234 (1968).

Petitioner cites no case which requires an undercover investigator posing as a member of the public to produce a warrant to enter a public, professional office.

Petitioner next infers that his rights were violated when the agent, from the public street, photographed the signs petitioner placed on the side of his house (wherein he conducted his offices). No warrant was required for that, *Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U.S. 861 (1974).

Nor was a warrant required to take pamphlets or other written material displayed on a public table or rack in his public reception room. This material was in the nature of advertising which petitioner expected patients and visitors to take, not personal books or records which he intended to be private. *Katz* v. *United States,* 389 U.S. 349, 351 (1967).

As To The Rules of Evidence

Citing no authority, petitioner claims violations of his rights in the receipt into evidence of an X-ray which he took of the State's agent and which he claims was not properly identified and connected to him. However, the agent testified that petitioner took an X-ray; discussed that X-ray with him on two visits; drew lines on the X-ray to show an alleged condition; and then gave the X-ray to the agent. All these factors, which petitioner ignores, are in the hearing record. The agent kept the X-rays he received from petitioner for the very purpose of the hearing.

The Courts of New York State have determined as a matter of New York law that the findings of facts as set

forth *supra* were based on substantial evidence and hence binding upon petitioner, *300 Gramatan Avenue Assoc.* v. *State Division of Human Rights,* 45 NY 2d 176 (1978). The technical rules of evidence do not apply to the administrative hearing herein, but the findings must be based on substantial legal evidence N.Y. Educ. L. § 6510(2b); *Matter of Erdman* v. *Ingraham,* 28 AD 2d 5 (1st Dept, 1967) app. withdrawn 20 NY 2d 768 (1967).

Petitioner has failed to show that the hearing panel was prejudiced. In assessing a measure of discipline for the unprofessional act of taking an X-ray without authority, the panel took into account that petitioner had previously been warned for the same misconduct. Under New York law this was a valid consideration. *Matter of Pell* v. *Board of Education,* 34 NY 2d 222, 240 (1974).

CONCLUSION

Certiorari should be denied.

Dated: New York, New York
July 7, 1980

Respectfully submitted,

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